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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DOMINIC VERNON JOHNSON,

Defendant and Appellant.

C081073

(Super. Ct. No. 99F05895)

This is an appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We will dismiss the appeal because we conclude that defendant Dominic Vernon Johnson has appealed from a nonappealable order.

I. BACKGROUND

In 2000, a jury convicted defendant of unlawful discharge of a firearm at an occupied motor vehicle (Pen. Code, § 246),¹ and found he personally used a firearm causing great bodily injury (§§ 12022.5, subd. (a)(1), 12022.7, subd. (a), 12022.53, subd.

¹ Undesignated statutory references are to the Penal Code.

(d)), and committed the offense to promote a criminal street gang (§ 186.22, subd. (b)). The court sentenced defendant to state prison for three years for the substantive offense, one year for the gang enhancement and a 25-year-to-life term for the firearm enhancement (§ 12022.53, subd. (d)). Defendant appealed. In his prior appeal, defendant contended that his postarrest statements were erroneously admitted, his 25-to-life sentence constituted cruel and unusual punishment, and the gang enhancement was barred and improper. This court affirmed the judgment. (*People v. Johnson* (Dec. 20, 2001, C036585) [nonpub. opn].) The judgment became final in 2002.

In October 2015, defendant filed a motion in the trial court to modify his sentence, contending that imposition of his sentence was “unlawful and/or unauthorized.” Defendant argued (1) the trial court “violated the mandatory pleading requirement of [section] 12022.53[, subdivision] (e)(1),” (2) his due process rights were violated because the jury did not find that he violated section 12022.53, subdivision (e)(1), (3) his 25-year-to-life term is unlawful or unauthorized because section 246 is not listed in section 12022.53, subdivision (a), (4) dual enhancements for being armed or using a firearm were imposed in error, (5) the record reflects the trial court did not believe it had discretion or the authority to stay the firearm enhancement or to sentence under a different provision, and (6) the gang expert testimony was insufficient to support the gang enhancement.

The trial court denied the motion, finding (1) defendant had failed to demonstrate that the sentence was unlawful or unauthorized; (2) the court had properly sentenced defendant; (3) ignorance of sentencing discretion did not demonstrate the sentence was unauthorized; (4) the challenge to the gang evidence was noncognizable; and (5) the gang enhancement was imposed based on the law in effect at the time of the offense.

Defendant appeals from the order.

II. DISCUSSION

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth a statement of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days elapsed, and we received no communication from defendant.

“ ‘[A]n order is not appealable unless declared to be so by the Constitution or by statute.’ ” (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 980 (*Gallardo*).) A defendant may appeal from “ ‘a final judgment of conviction’ [citations] or from ‘any order made after judgment, affecting the substantial rights’ of the party [citations].” (*Ibid.*)

An order denying a motion to modify the sentence would appear at first glance to qualify as an “order made after judgment, affecting the substantial rights” of the party. (*Gallardo, supra*, 77 Cal.App.4th at p. 980.) The language, however, is not interpreted broadly but instead is interpreted narrowly and an order is not appealable “when the appeal would merely bypass or duplicate appeal from the judgment itself.” (*Id.* at p. 981; accord, *People v. Totari* (2002) 28 Cal.4th 876, 882 (*Totari*); *People v. Thomas* (1959) 52 Cal.2d 521, 527; *People v. Vaitonis* (1962) 200 Cal.App.2d 156, 158-159.) There are exceptions for a judgment void on its face or when the appellate record would not have shown the error (*Gallardo, supra*, at p. 981), or “when clarification of the law is deemed important in the court’s discretion” (*Totari, supra*, at p. 882).

Here, defendant previously appealed from the judgment and the judgment was affirmed. The judgment has long since been final. Defendant filed a motion to modify the sentence more than a decade later. In this appeal, defendant seeks to duplicate the appeal from the judgment itself. Defendant’s motion did not claim that the judgment was void on its face, or claim that the appellate record would not have shown the error. Clarification of the law is not required here. In such instance, “the appeal from the order

denying motion to modify is unauthorized and must be dismissed.” (*People v. Cantrell*
(1961) 197 Cal.App.2d 40, 45.)

III. DISPOSITION

The appeal is dismissed.

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

MURRAY, J.